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STATE OF CALIFORNIA

State Energy Resources
Conservation and Development Commission

In the Matter of:	)	**Docket No. 99- AFC-3**
	)	
Application for Certification for the	)	Motion by Robert F. Williams To appoint a new Metcalf Siting Committee to replace Mssrs Laurie and Keese, due to bias
Metcalf Energy Center [Calpine Corporation and Bechtel Enterprises, Inc.]	)	

Robert F. Williams **hereby petitions the California Energy Commission appoint a new Siting Committee for the Metcalf Energy Center, because of demonstrated bias on the part of the Siting Committee composed of Commissioner Laurie, and Commissioner Keese.**

1. The facts that demonstrate bias sufficient to ask for replacement are as follows:

a) The San Jose Planning commission issued a 47 page staff report [1], on or about Monday November 13, in preparation for hearings by the Planning Commission Wednesday, November 13, 2000. The report recommended the general plan amendment not be approved, and indicated deferral of an affirmative action approving rezoning was necessary, because among other reasons, the FSA [2] was not yet suitable as a Final Environmental Impact statement.

It is possible that draft versions of the Planning Department staff report were available the previous Thursday or Friday in draft form to various members of the Planning Commission and the office of the Mayor and City Council.

b) Volunteered Opinion by CEC Metcalf Siting Committee [2]. The record as it stands makes it appear that the Siting Committee made the request to the Chief Counsel of the CEC, and then volunteered the opinion of the CEC staff to the City of San Jose in a precipitous manner, since the order sent by email was not signed. If other facts are in evidence that are exculpatory, please bring them to my attention in the hearing on this motion, and as much prior to the hearing as possible.

The record as it stands [2] appears to demonstrate bias and favoritism on the part of the CEC Siting committee in favor of the applicant, Calpine/Bechtel.

c) This party to the proceeding hand delivered his letter to the Planning Commission, the Mayor, the City Council, the City Attorney and others, the morning of November 14, 2000 in preparation for the public comment period November 15, 2000 beginning at 6:30 pm.

This party anticipated the completeness of the Staff Assessment would be a matter of some importance, and directed the second point of his executive summary to this issue, but had no prior knowledge of the CEC letter [2]. Note that the arguments offered by the San Jose Planning Department Staff report, at pages 43 and 44.[1] In the section titled Environmental Review Status, in the final paragraph of this section on page 44

> "In other words, there is no environmental clearance at this time for the pending General Plan Amendment ad Planned Development zoning. Therefore, the only choices for action are denial of the application, or deferral of action until an environmental clearance document ha been completed by the Commission.

In the previous paragraph,

> "A 'commission document' is one prepared by or on the behalf of the five-member Commission and not CEC staff. The first document produced by the Commission which qualifies under this statute is a record of decision to approve or deny the power plant, along with environmental information, findings and, if approved, conditions of approval. Although there is not a firm date by which this document will be produced or approved by the Commission, it is not expected until February 2001 at the very earliest.

This party in a letter to the planning Commission Dated November 13 [3], and delivered by hand November 14, 2000, raised the following additional arguments, that support the position taken by the San Jose City Attorney, presumably advising the Planning Department. I quote from my November 13, 2000 letter [3] as follows:

"**2. The Preliminary FSA is not legally sufficient as a basis to change zoning. It together with other documents, can be used ONLY as a basis to Vote NO and maintain the status quo excluding the plant. We hope you will VOTE NO NOW to stop this tedious process, because after 20 months citizens are tired, the impacts are known, and are severe and unmitigable.**

> The pFSA cannot be used as an EIR to justify a yes vote, because <u>an entire class of public comments have been excluded by CEC policy</u> at this stage of the CEC process. The CEC characterizes the process as nearing the end of an informal discovery phase. The CEC process does NOT become equivalent to a Final EIR under the California Environmental Quality Act CEQA until the CEC process is complete in it entirety for several reasons. The pFSA is 1) a staff document with no CEC Commission or Siting Committee review or approval, 2) The pFSA excludes by policy an entire class of issues, those raised by the formal intervenors, while prominently featuring a handful of letters from the interested Public, and 3) it includes assumptions regarding favorable resolution regarding a plethora of major changes with no facts in evidence, 4) it reaches conclusions that are the reverse of facts in evidence. Further input by the public and by the City will soon have to be conducted at great expense, with formal hearings petitions and court action. The pFSA is incomplete and does not meet CEQA requirements for a Final EIR."

3. Because of the workload imposed by the ill advised Metcalf Siting Committee opinion, the petitioner has filed today a motion to delay the Pre Hearing conference due to excessive workload imposed by the opinion on the FSA, and other matters directly related to the Metcalf Proceeding, and cited in the companion petition. [4] **The petition seeks to delay the pre-hearing statements and conference by 15 days to December 15, 2000, and by another 15 days if a new Siting committee is appointed.**

The reason is fundamental to the Anglo Saxon and American system of law. Hearings in Court, or hearings conducted under Administrative law deserve to be conducted by a judge or panel that is fair and impartial.

The Action of the CEC Chief Counsel, and The Siting Committee members forwarding the opinion reflect two elements that totally vitiate the prospective Evidentiary Hearings.

a) The Siting Committee appears to believe the FSA as it now stands is sufficiently close to the product of the evidentiary hearings, to be endorsed as equivalent to a Presiding Members Preliminary Decision. There is no more clear indication of bias than this letter.[1]

b) The opinion of the Chief Counsel does not address what has be previously explained by numerous members of the CEC staff, and even the Counsel to the applicant, that the application is only near the end of the preliminary discovery phase. In particular, the applicants discussions with the CEC staff, and the staffs conclusions have been reached without any of the prospective submittals of an entire class of interested parties.

4. The possibility of a CEC over ride of LORS. Previous case law regarding the power of eminent domain, and the possibility of CEC over ride of LORS has been rendered moot by energy de-regulation under AB1890, and recent amendment, Peace SB110 for example.

a) Statutes now reflect that the need for power is not even a consideration, and a public taking, eminent domain, on behalf of a private for profit entity with monopoly or significant market power per FERC[3], has no where been approved. I am confident of this statement, because a public taking of private property can not happen under our Constitution, without a demonstration of significant "public necessity and convenience."

b) In the matter of public necessity and convenience, **the staff Alternatives assessment shows other suitable sites, with less adverse unmitigable impact.** Thus the FERC [3] prospective order finding **inappropriate market power** for the four Private for Profit California independent power suppliers, coupled with the concerns of **bias on the part of Cal-Iso and Cal-PX** should indicate **there are dramatic departures from previous case law regarding either a public taking** for the site or its associated linear facilities, in this case the water pipeline, 7 to 10 miles long, depending on the pipeline routing through the City.

The STAction submittal, by Dr. Jeff Wade chairman of the Technical committee makes a presentation that offers a convincing ad completely different view of the need for power.[7] By 2003 the earliest the plant can come on line, the energy shortage will be ameliorated, the Metcalf station if built will be exporting power to the Western Grid, and indeed California may be in a power surplus situation, needing imports primarily for reserve margin. In summary Moss Landing

and transformer upgrades at the PG&E metcalf substation will solve the electric reliability problem in South San Jose.

Thus there is plenty of time to allow due process, and to examine carefully the rationale for Siting an obsolescent technology, SCR, with insufficient mitigation of visible plumes from wet cooling towers, in the heart of a prospective area planned for corporate headquarters development.

One month delay Pre Hearing conference to January 2-5, 2001 is completely reasonable under the circumstances. The need for power is particularly not an issue at Metcalf beginning 2003.

5 Since the preparation of the CEC analysis is, in part, for the purpose of Amending the San Jose general plan, LORS, and an annexation, to suggest that the process is complete totally vitiates the remainder of the process, with the main effect only how the potentially toothless regulations of the CEC will be enforced. In my previous submittal of comments on the PSA [4] and my submittal in preparation for the July 17 status conference [4],[5] I have illustrated how the **Daily revenues to the 600 MWe plant will total about $1.44 Million dollars per day, when power is purchase at 10 cents per Kwhr. Ten cents corresponds to $100 per Giga Watt hour (GWhr). The FERC report [5] points out that price caps during recent periods have been $150 per GWhr, and suggests lowering them to $ 100 per GWhr. The FERC report also calls into question the CAL-ISO practice of paying the highest bid price that is accepted to all bidders, not the bidders own price.**

6. Conditions of compliance are deficient. As minimum hearings are required to put more teeth into the draft conditions of certification, or the applicant has every incentive to run the plant whether in or out of compliance. The current CEC statutory authority for fines is a slap on the wrist in the present unregulated market for power. **What's worse, any fines, which under CPUC rules went to the owner, under de-regulation will be paid by the public through the market based pricing mechanism.**

Hearings are required to validate and strengthen the conditions of compliance or there is no assurance that operation in the present FSA will occur as promised.

Without the proper assurances, this EIS is deficient and cannot be used as a basis for action.

Summary:

1. Appointment of a new Siting Committee is necessary to restore the appearance and the reality of fairness and integrity to the evidentiary hearings.

2. While the CEC is considering this petition, I request the CEC to forward this matter to the attention of the Agency governing the California Energy Commission. I believe this is the State Energy Resources Conservation and Development Commission. Recognizing that member of the MEC Siting Committee, it does not appear fair for him or Mr. Laurie to contest the matter of their own replacement while siting on the Commission.

Accordingly, appointment of two other members from the remaining three Commissioners would appear to be the fairest and most expeditious way to proceed.

3. Alternatively, hearings on this matter should be held before the State Energy Resources Conservation and Development Commission.

4. Reschedule the Pre Hearing Statements and PreHearing Conference to January 2001.

The motion is based on the pleadings and records on file in this proceeding and the following:

x	**The above declaration of Robert F. Williams**
x	**The referenced documents, some of which are available on the internet, not attached**
x	**Oral and documentary evidence that may be presented at hearing**

Date **Signature**

x **Check box if continuation pages are attached. (Proof of service must be attached.)**

[1] San Jose Planning Department, November 13, 2000, Staff report on Metcalf, 47 pages
[2] Commissioners Laurie and Keese to Mayor Gonzales, November 13, 2000 with letter Chamberlain to the above dated November 13, 2000 attached, 4 pages.
[3] Williams to San Jose Planning Commission, et. al, November 13, 2000, 8 pages
[4] Williams to CEC et. al., "Motion to delay Pre Hearing Statements, and Pre Hearing Conference by 15 days, November 21, 2000 99-AFC-3
[5] FERC, "Market Order Proposing Remedies for California Wholesale Electrics," November 1, 2000 Docket EL00-95-000, on the internet.
[6] Williams to CEC re 99-AFC-3, comments on the PSA, June 24, and submittal to the status conference, July 10, 2000, see CEC website, intervenor and other documents
[7] J.E. Wade, submittal on behalf of STAction to the San Jose Planning Commission, regarding the Metcalf Energy Center, November 13, 2000